

IN THE MATTER OF the Human Rights Code, R.S.O. 1990,
Chap. H-19;

AND IN THE MATTER OF the complaint of Richard Persad dated June 9, 1987, alleging discrimination in employment on the basis of age, colour, race and ancestry by Sudbury Regional Police Force, Richard Zanibbi, D.B.McKay, Denis O'Neill, Inspector Watson, Inspector Lavoie, and Doug Wuksinic.

Chairperson: Professor M.L. Friedland, Q.C.

Counsel for the Commission: Mark Hart

Counsel for Respondents: Jack Braithwaite

Preliminary Motion for a Stay of Proceedings

The respondents brought a preliminary motion to have the complaint stayed on the basis of unreasonable delay. The motion was heard by me at Sudbury on July 6, 1992.

The complainant, Richard Persad, filed a complaint on June 9, 1987 against the Sudbury Regional Police Force and certain personal respondents alleging discrimination in employment on the basis of age, colour, race and ancestry. About a week later the complaint was served on the respondents. The Ontario Human Rights

Commission proceeded with its investigation at a very slow pace. Eventually, a Board of Inquiry was requested and on April 27, 1992 the Minister appointed me to act as a Board of Inquiry to hear and decide the complaint.

Counsel for the complainant frankly conceded that the delay in this case was solely the fault of the Commission. It was neither the fault of the respondents nor the complainant. The delay caused by the Commission, he acknowledged, could not be adequately explained.

Counsel for the respondents sought a remedy for the delay under the Canadian Charter of Rights and Freedoms; under section 23 of the Statutory Powers Procedure Act (R.S.O. 1990, chap. S-22); and under the common law.

The Charter

Sections 7 and 11(b) of the Charter were invoked and a remedy sought under section 24(1). Section 7 provides:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

Section 11(b) provides:

"Any person charged with an offence has the right ... (b) to be tried within a reasonable time".

And section 24(1) provides:

"Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

For section 11(b) to apply, however, a person has to be "charged with an offence". A complaint under the Ontario Human Rights Code is not "an offence". It is not a criminal or quasi-criminal proceeding, nor is it a proceeding giving rise to penal consequences. As a result it is outside the scope of section 11. (See Wigglesworth v. The Queen (1987) 45 D.L.R. (4th) 235 (S.C.C.)).

Of course, if this had been a charge brought against the respondents for an offence under section 43 of the Code ("Every person who contravenes [various provisions] is guilty of an offence

and on conviction is liable to a fine of not more than \$25,000), then section 11(b) would clearly apply. In such a case, in the light of R. v. Askov (1990) 59 C.C.C. (3d) 449 (S.C.C.) and R. v. Morin (1992) 71 C.C.C. (3d) 1 (S.C.C.), it would be difficult to argue that five years was not "unreasonable delay" which would lead to a stay of proceedings. But this is not a charge under section 43. It is a complaint under section 8 of the Act.

Is section 7 of the Charter applicable? In Irwin Toy Ltd. v. A.G. Quebec (1989) 58 D.L.R. (4th) 577 (S.C.C.) the Supreme Court of Canada held that section 7 is not applicable to corporations and other artificial entities and the Sudbury Regional Police Force is clearly an artificial entity. Thus it cannot take advantage of section 7.

But can the individual respondents use section 7 of the Charter in this case? Other Boards of Inquiry have not applied section 7 to proceedings under the Human Rights Code. As Chairperson Backhouse stated in the recent Gale decision (Gale v. Miracle Food Mart et al, May, 1992):

"it appears that section 7 of the Charter has no application to remedial proceedings under the Code. There is a fundamental distinction between criminal and quasi-criminal proceedings, in which a person's life, liberty

and security of the person may be in jeopardy, and human rights proceedings which are essentially civil in nature".

Other Boards of Inquiry and courts have taken a similar approach: see, e.g., Gosh v. Domglass Inc. and Others (Nov. 1991, Hubbard); Re Bennett and British Columbia Securities Commission (1991) 82 D.L.R. (4th) 129 (B.C.S.C.); Cosyns v. A.G. Canada (1992) 7 O.R. (3d) 641 (Div. Ct.); cf. Saskatchewan Human Rights Commission v. Kodellas (1989) 60 D.L.R. (4th) 143 (Sask. C.A.). If punitive damages could be awarded under the Human Rights Code, then perhaps section 7 would be applicable, but the Ontario Divisional Court has held that the award of punitive damages is not permissible under the Code (York Condo. Corp. v. Dudnik (1991) 3 O.R. (3d) 360).

Thus, I hold that section 7 is not applicable in this case.

Statutory Powers Procedures Act

The respondent argued that section 23 of the Statutory Powers Procedure Act is applicable to stay proceedings because of delay. Section 23(1) provides:

"A tribunal may make such orders or give such directions in proceedings before it as it

considers proper to prevent abuse of its processes."

Earlier Boards of Inquiry have interpreted this section narrowly in the context of delay. In the Hyman case (Hyman v. Southam Murray Printing (1982) 3 C.H.R.R. D/617), which has been followed by other Boards (see Gale v. Miracle Food Mart (May, 1992, Backhouse); Gohm v. Domtar (1989) 10 C.H.R.R. D/5968, Pentney); Guthro v. Westinghouse (Aug. 1991, Gorsky)), Chairperson McCamus states (p. D/621):

"delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of determination that a contravention of the Code has occurred. Having been assigned, by order of the Minister ..., a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of

considerable time, unless the passage of time has made fulfilment of its task impossible."

There is no evidence before me that such is the case here. It would be particularly unfair to deprive a complainant who has been without fault in bringing about the delay of potential compensation under the Code if the complaint is a valid one.

A further argument is made by the respondents that the proceedings should be stayed on the basis of a common law power of abuse of process or on the basis of a common law right to fairness. In my view, these remedies are now subsumed in a case like this under section 23(1) of the Statutory Powers Procedure Act.

Thus, the respondents motion is dismissed.

July 31, 1992

M.L. Friedland

M.L. Friedland, Q.C.

